U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 14-0272 BLA-A
and 14-0272 BLA-B[1]

ROSETTA WILSON (Widow of ARLEN EUGENE WILSON) Claimant-Petitioner v. BELL COUNTY COAL CORPORATION and AMERICAN INTERNATIONAL SOUTH Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/29/2015 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in the Miner's Claim; and Order Directing the Parties to Show Cause Why I Should Not Remand the Claimant's Survivor's Claim to the District Director of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Frank K. Newman (Cole, Cole, Anderson & Newman, PSC), Barbourville, Kentucky, for claimant.

Tighe Estes (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer/carrier.

[1] By Order, the Board granted the request of the Director, Office of Workers' Compensation Programs, to dismiss the appeal in BRB No. 14-0272 BLA. *Wilson v. Bell County Coal Corp.*, BRB Nos. 14-0272 BLA, 14-0272 BLA-A, and 14-0272 BLA-B, slip op. at 1 (Aug. 19, 2014) (Order) (unpub.).

Before: HALL, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Claimant[2] appeals, and employer/carrier (employer) cross-appeals,[3] the Decision and Order Denying Benefits in the Miner's Claim; and Order Directing the Parties to Show Cause Why I Should Not Remand the Claimant's Survivor's Claim to the District Director (2007-BLA-05463 and 2011-BLA-06254) of Administrative Law Judge Adele Higgins Odegard (the administrative law judge) rendered on both a miner's claim and a survivor's claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited the miner with 25 years of coal mine employment, based on the parties' stipulation, and adjudicated the miner's claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. Although the administrative law judge found that the evidence did not establish either the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 or the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), she found that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge also found that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Further, the administrative law judge found that the evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits in the miner's claim. With regard to the survivor's claim, the administrative law judge directed the parties to show cause, within 30 days of the date of the Decision and Order, why the case should not be remanded to the district director for further evidentiary development regarding the cause of the miner's death and claimant's eligibility as a surviving spouse.[4]

[2] Claimant is the widow of the miner, who died on November 21, 2009. Survivor's Claim Director's Exhibit 6. The miner filed a claim on March 19, 2004. Miner's Claim Director's Exhibit 2. Claimant is pursuing this claim on the miner's behalf. She filed a survivor's claim on June 30, 2010. Survivor's Claim Director's Exhibit 1.

[3] Employer filed a consolidated brief in support of its cross-appeal and in response to claimant's brief.

[4] Administrative Law Judge Adele Higgins Odegard (the administrative law judge) noted that her determination of whether to adjudicate the survivor's claim on the existing evidence of record or to remand the survivor's claim to the district director for further evidentiary development would be based on the parties' responses to the Order to Show Cause.

On appeal, claimant challenges the administrative law judge's finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304. Claimant also challenges the administrative law judge's finding that the evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Claimant additionally challenges the administrative law judge's finding that the evidence did not establish either total respiratory disability at 20 C.F.R. §718.204(b)(2)(i), (iv) or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).[5] Employer responds, urging affirmance of the administrative law judge's denial of benefits in the miner's claim. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal.[6]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment.[8] 30 U.S.C. §901; 20 C.F.R.

[5] Claimant requests confirmation regarding the status of the survivor's claim. By Order dated May 12, 2014, the administrative law judge remanded the survivor's claim to the district director, as the parties agreed to further evidentiary development of the claim, rather than a decision based on the existing record. Because claimant has not filed a timely appeal of the administrative law judge's Order, the Board does not have jurisdiction in the survivor's claim and cannot confirm its status. *Muscar v. Director, OWCP*, 18 BLR 1-7, 1-8 (1993).

[6] Because the administrative law judge's length of coal mine employment finding and her findings that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), and that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(ii) and (iii) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[7] The record indicates that the miner was employed in the coal mining industry in Kentucky. Director's Exhibit 3. Accordingly, the law of the United States Court of Appeals for the Sixth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[8] Claimant asserts that the presumption of total disability due to pneumoconiosis at

§§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers or suffered from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether a claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31 (1991)(en banc).

EVIDENTIARY LIMITATIONS
Section 725.414

Initially, we will address claimant's contention that the administrative law judge erred in failing to address the effect of the evidentiary limitations on the admissibility of Dr. Selby's June 2012 report. Claimant argues that "[the administrative law judge] should address the admission of excess evidence under the 'good cause' standard." Claimant's Brief at 10-11. Contrary to claimant's contention, the administrative law judge permissibly admitted Dr. Selby's June 2012 report into the record in accordance with the evidentiary limitations set forth at 20 C.F.R. §725.414, as the evidentiary limitations do not require that a medical report be contained in a single document. *See* 20 C.F.R. §725.414(a)(1). In addition to noting that Dr. Selby's October 2009 report was admitted into the record as Director's Exhibit 81, the administrative law judge noted that, by Order dated July 22, 2012, Administrative Law Judge Ralph A. Romano denied claimant's motion to strike Dr. Selby's June 2012 report from the record. The administrative law judge acted within her discretion in construing "the two submissions from Dr. Selby [as] a medical report and a supplemental report, and thus…as a single

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amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305 (2014), should apply to the miner's claim because it was consolidated with a survivor's claim filed on June 30, 2010. Contrary to claimant's assertion, the presumption at amended Section 411(c)(4) does not apply in this case because the miner's claim was filed before January 1, 2005.

medical report for purposes of [Section] 725.414." Decision and Order at 5 n.10; *see generally Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-146-47 (2006); *C.L.H.* [*Hill*] *v. Arch on the Green, Inc.*, BRB No. 07-0133 BLA, slip op. at 4 (Oct. 31, 2007)(unpub.)(deferring to the Director's position that supplemental reports based on review of admissible evidence do not exceed the two-report limitation). Thus, we reject claimant's assertion that the administrative law judge violated the evidentiary limitations by admitting Dr. Selby's June 2012 report into the record.

COMPLICATED PNEUMOCONIOSIS
Section 718.304

Next, we address claimant's contention that the administrative law judge erred in finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304. In considering the issue of complicated pneumoconiosis, the administrative law judge noted that although "the weight of the X-ray evidence (§718.304(a)) is positive for pneumoconiosis…, there is no evidence on the other two 'prongs.'"[9] Decision and Order at 24. The administrative law judge determined that "the X-ray evidence is outweighed by the physician opinion evidence, which establishes that the [m]iner's rheumatoid arthritis was likely responsible for the large abnormalities in [his] lungs." *Id*. Hence, the administrative law judge found that the preponderance of the evidence did not establish the presence of complicated pneumoconiosis at Section 718.304.

Claimant asserts that the administrative law judge erred in weighing together all of the evidence at 20 C.F.R. §718.304. Specifically, claimant asserts that the administrative law judge should have given determinative weight to the x-ray evidence of complicated pneumoconiosis. Claimant argues that the administrative law judge did not properly address the findings of complicated pneumoconiosis by Drs. Baker, Broudy and Westerfield. Claimant avers that "[the administrative law judge] improperly relied on a diagnosis of rheumatoid arthritis as the sole causation for the large opacities in the miner's lungs when the biopsy evidence and x-ray evidence supported a diagnosis of pneumoconiosis." Claimant's Brief at 7. We disagree.

[9] The administrative law judge determined that "the biopsy evidence (§718.304(b)) is negative as to complicated pneumoconiosis." Decision and Order at 24. Further, with regard to Section 718.304(c), the administrative law judge found that Dr. Wheeler interpreted the only CT scan of record and concluded that the masses in the miner's lungs were not pneumoconiosis, but were likely histoplasmosis. The administrative law judge also determined that "there is no well-reasoned physician opinion to support the conclusion that the [m]iner had complicated pneumoconiosis." *Id*.

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178 (1984), and to assess the evidence of record and draw her own conclusions and inferences from it. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). In considering the x-ray evidence, the administrative law judge noted that "Dr. Baker, Dr. Broudy, and Dr. Westerfield all identified opacities that are classified within the definition of complicated pneumoconiosis: Category 'B' or 'C' opacities." Decision and Order at 10. After noting that Drs. Baker, Broudy and Westerfield are all B readers, the administrative law judge stated, "Notably, all of the physicians --- including dually-qualified physicians Dr. Wheeler, Dr. Wiot, and Dr. Poulos --- noted abnormalities that, if pneumoconiotic in origin, meet the regulatory definition of complicated pneumoconiosis at [Section] 718.304(a) of 'one or more large opacities (greater than 1 centimeter in diameter[])].'"[10] *Id*. at 21. The administrative law judge permissibly found that the weight of the x-ray evidence was positive for the presence of complicated pneumoconiosis at Section 718.304(a). *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Conversely, the administrative law judge permissibly found that the biopsy evidence did not establish the presence of complicated pneumoconiosis at Section 718.304(b).[11] *See Terlip v. Director, OWCP*, 8 BLR 1-363, 1-

[10] The administrative law judge noted that "the dually-qualified physicians [Drs. Wheeler, Wiot and Poulos] citied other causes for the [m]iner's large opacities, such as malignancy or histoplasmosis or tuberculosis." Decision and Order at 21. The administrative law judge also noted that "[t]he [m]iner's biopsy result from [May 5, 2009] indicates that he had neither cancer nor any fungal infection in his lungs. CX 1." *Id*. Further, the administrative law judge noted that "the [m]iner stated that he never had tuberculosis. DX 20 at 23." *Id*.

[11] The administrative law judge considered the report of the February 5, 2001 biopsy by Dr. Bathija and the reports of the May 5, 2009 biopsy by Dr. Meece and Dr. Caffrey. The administrative law judge found that the February 5, 2001 biopsy did not establish the existence of pneumoconiosis. Although the administrative law judge found that the May 5, 2009 biopsy established the existence of simple clinical pneumoconiosis, she found that this biopsy did not establish the presence of complicated pneumoconiosis. The administrative law judge noted that "neither Dr. Meece nor Dr. Caffrey identified complicated pneumoconiosis in the biopsy of [May 5, 2009], and neither described tissue that meets the definition of complicated pneumoconiosis in [Section] 718.304(b) ('massive lesions in the lung')." Decision and Order at 21. The administrative law judge noted that "[b]oth [Dr. Meece and Dr. Caffrey] also stated, notably, that the [m]iner's lung tissue, in addition to being compatible with coal workers' pneumoconiosis, was also

364 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). Further, with regard to Section 718.304(c), the administrative law judge considered Dr. Wheeler's interpretation of the November 30, 2004 CT scan and the opinions of Drs. Caffrey, Baker, Broudy, Vaezy and Selby. The administrative law judge permissibly found that "Dr. Wheeler recognized the [m]iner had multiple large (1 cm and greater) masses in the lungs, but he concluded they were not pneumoconiosis."[12] Decision and Order at 23; *see Mabe*, 9 BLR at 1-68; *Sisak*, 7 BLR at 1-181. In addition, the administrative law judge permissibly accorded weight to Dr. Caffrey's opinion that the miner had rheumatoid arthritis with rheumatoid disease of the lungs because it was supported by objective evidence and medical authority. *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829, 1-832 (1985); Employer's Exhibit 9. Moreover, the administrative law judge permissibly accorded little weight to the opinions of Drs. Baker, Broudy and Vaezy that the miner had complicated pneumoconiosis because they were not well-reasoned.[13] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-

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compatible with 'rheumatoid nodule' (Dr. Meece) or 'rheumatoid lung' (Dr. Caffrey)." *Id*.

[12] Dr. Wheeler read the November 30, 2004 CT scan as showing masses in the periphery of both lungs that were 1-2 centimeters in size and compatible with granulomatous disease. Employer's Exhibit 8. Further, Dr. Wheeler found that the origin of the masses was more likely histoplasmosis than tuberculosis. *Id*. Dr. Wheeler also found that there was no coal workers' pneumoconiosis from the small nodular infiltrates that merged with the large opacities. *Id*. The administrative law judge found that "it is highly unlikely that the [m]iner's lung abnormalities were histoplasmotic in origin" because the biopsy evidence was negative for fungal infection. Decision and Order at 23. The administrative law judge additionally stated that, "even if the [m]iner's lung abnormalities are not histoplasmotic in origin, it does not necessarily follow that they must be pneumoconiotic." *Id*.

[13] After noting that Dr. Broudy diagnosed complicated pneumoconiosis based on an x-ray and a CT scan, the administrative law judge stated, "I infer that because Dr. Broudy was not aware the [m]iner had rheumatoid arthritis, he did not consider whether the [m]iner's X-ray/CT scan could have shown rheumatoid arthritis of the lung ('Caplan's syndrome')." Decision and Order at 22. The administrative law judge found that "Dr. Broudy's conclusion that the [m]iner had complicated pneumoconiosis is compromised, because he either failed to consider whether the abnormalities were due to rheumatoid arthritis of the lung or, alternatively, he failed to address why he excluded that diagnosis." *Id*. at 23. The administrative law judge also found that "Dr. Baker's opinion suffers from the same flaw as Dr. Broudy's [opinion]" because Dr. Baker's later opinion adopted Dr. Broudy's opinion. *Id*. In addition, the administrative law judge

149 (1989)(en banc). Thus, because the administrative law judge permissibly found that the x-ray evidence was outweighed by the medical opinion evidence, *see Gray*, 176 F.3d at 387, 21 BLR at 2-624; *Melnick*, 16 BLR at 1-33-34, we reject claimant's assertion that the administrative law judge should have given greatest weight to the x-ray evidence of complicated pneumoconiosis in weighing together all of the evidence at 20 C.F.R. §718.304.

Claimant also asserts that Dr. Vaezy's opinion should have been accorded determinative weight based on the doctor's status as the miner's treating physician. Because the administrative law judge permissibly accorded little weight to Dr. Vaezy's opinion that the miner had complicated pneumoconiosis on the basis that it was not well-reasoned, *see Clark*, 12 BLR at 1-155; *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2003), we reject claimant's assertion that the administrative law judge erred in weighing Dr. Vaezy's opinion.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304.

TOTAL RESPIRATORY DISABILITY
Section 718.204(b)(2)(i), (iv)

Claimant also contends that the administrative law judge erred in finding that the pulmonary function study evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i). Specifically, claimant asserts that "[t]he administrative law judge did not properly consider medical evidence related to pulmonary function studies performed by claimant's treating physician, Dr. Abdi Vaezy." Claimant's Brief at 8. We disagree.

The record consists of five pulmonary function studies dated August 27, 2003, June 24, 2004, November 30, 2004, January 3, 2005 and August 19, 2005. While the January 3, 2005 study administered by Dr. Vaezy yielded non-qualifying[14] values at rest, Director's Exhibit 54 at 20, the August 27, 2003 and August 19, 2005 studies administered by Dr. Vaezy yielded qualifying values at rest, Director's Exhibit 54 at 9,

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found that "Dr. Vaezy's conclusions regarding complicated pneumoconiosis are equivocal and not well-articulated." *Id.*

[14] A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

25. The June 24, 2004 study administered by Dr. Baker yielded qualifying values at rest, Director's Exhibit 11, and the November 30, 2004 study administered by Dr. Broudy yielded qualifying values at rest and during exercise, Director's Exhibit 54 at 37. The administrative law judge, however, permissibly determined that "the [August 27, 2003, January 3, 2005 and August 19, 2005] tests administered under Dr. Vaezy's aegis were not valid, because multiple trials were not done" and "the [m]iner gave less than full effort" for tests in which multiple trials were administered. Decision and Order at 27; *see Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986); *Estes v. Director, OWCP*, 7 BLR 1-414, 1-415 (1986). The administrative law judge also permissibly gave some weight to the consultation opinion of Dr. Broudy that Dr. Vaezy's January 3, 2005 study was "not valid because only one trial was administered," based on Dr. Broudy's status as a Board-certified pulmonologist. Decision and Order at 27; *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Further, the administrative law judge permissibly gave some weight to Dr. Broudy's opinion that "the test he himself conducted [on November 30, 2004] was 'technically not valid' because there was excessive variation between the best results of the forced vital capacity, pre-bronchodilation." Decision and Order at 27; *see Brinkley*, 14 BLR at 1-149. The administrative law judge additionally stated that "[Dr. Broudy] believed the [m]iner's effort was less than optimal, and he noted the technician also noted the [m]iner's effort was 'variable.'" Decision and Order at 27; *see Brinkley*, 14 BLR at 1-149. Moreover, the administrative law judge acted within her discretion in giving limited weight to Dr. Broudy's opinion that Dr. Baker's June 24, 2004 qualifying study was valid "[b]ecause Dr. Broudy did not discuss the [m]iner's effort, in light of the note regarding suboptimal effort, and did not specifically indicate that the flow-volume loops were satisfactory."[15] Decision and Order at 27; *see Mabe*, 9 BLR at 1-68; *Sisak*, 7 BLR at 1-181. Thus, we reject claimant's assertion that the administrative law judge erroneously considered the pulmonary function study evidence.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the pulmonary function study evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i).

Further, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the opinions of Drs. Baker,

[15] The administrative law judge noted that Dr. Broudy opined that Dr. Baker's June 24, 2004 study was valid "because it met the regulatory standards for variability; there was no evidence of abrupt cessation of flow or excessive back crepitation; and the forced expiratory time was satisfactory." Decision and Order at 27. However, the administrative law judge also noted that "[Dr. Broudy] did not address the note in the test record that the flow-volume loops were suggestive of suboptimal effort. *Id.*

Broudy and Selby, as well as the treatment notes of Dr. Vaezy.[16] In a report dated June 24, 2004, Dr. Baker opined that the miner had a mild to moderate respiratory or pulmonary impairment. Director's Exhibit 11. In a subsequent report dated December 11, 2006, Dr. Baker found that "[the miner's] pulmonary functions, as noted above, are borderline but with the work description that you gave, I think it would be very difficult for him to perform that type of work on a daily basis." *Id*. Dr. Baker therefore opined that the miner's respiratory impairment prevented him from doing his usual work. Director's Exhibit 54. Dr. Baker further found that the miner's respiratory impairment "with his x-ray changes of Coal Workers Pneumoconiosis…would imply that he is disabled for any further exposure to coal dust, rock dust or similar noxious dusty agents." *Id*. Dr. Broudy, in a report dated November 30, 2004, opined that "[the miner's] lung function results meet the federal criteria for disability in coal workers' [sic]." Director's Exhibit 54. In a report dated October 10, 2009, Dr. Selby opined that the miner had the pulmonary capacity to perform arduous labor similar to his usual coal mine job in a dust-free environment. Employer's Exhibit 4. During a deposition dated April 12, 2012, Dr. Selby opined that the miner had a mild obstructive impairment. Employer's Exhibit 5 (Dr. Selby's Depo. at 13). Based on her consideration of these medical reports, the administrative law judge found that "there is no well-reasoned physician opinion that the [m]iner is totally disabled." Decision and Order at 32. The administrative law judge also found that "Dr. Vaezy's treatment notes (DX 54) do not specifically address whether the miner had total pulmonary disability." *Id*. at 30 n.54. Hence, the administrative law judge found that the medical opinion evidence did not establish total respiratory disability at Section 718.204(b)(iv).

Claimant asserts that the administrative law judge failed to properly consider the opinions of Drs. Baker and Broudy. Contrary to claimant's assertion, the administrative law judge permissibly found that "Dr. Baker's opinion, that the [m]iner would have found his regular coal mine work 'difficult' due to his respiratory condition, does not constitute a determination of total respiratory disability."[17] Decision and Order at 32; *see Maddaleni*, 14 BLR at 1-140; *Lafferty*, 12 BLR at 1-192; *Stark*, 9 BLR at 1-37. In addition, the administrative law judge permissibly found that Dr. Broudy did not render an opinion regarding the issue of total respiratory disability, as he "merely commented

[16] In a report dated June 13, 2012, Dr. Caffrey opined that the miner's simple coal workers' pneumoconiosis would not have caused any discernable pulmonary disability. Employer's Exhibit 9.

[17] The administrative law judge stated, "Under the regulation, a miner is totally disabled if his respiratory condition prevents him from doing his regular coal mine work; a condition that only makes his work more difficult, but does not entirely preclude him from working, is insufficient to establish disability." Decision and Order at 32.

that the results of the pulmonary function test he administered to the [m]iner were qualifying for disability." Decision and Order at 31; *see Maddaleni*, 14 BLR at 1-140; *Lafferty*, 12 BLR at 1-192; *Stark*, 9 BLR at 1-37. Alternatively, the administrative law judge permissibly found that, "if [Dr. Broudy's] comment is considered to be an opinion, then the opinion is not well-reasoned, because it is based on invalid pulmonary test results and Dr. Broudy did not cite any other evidence to support a total disability finding." Decision and Order at 31; *see Clark*, 12 BLR at 1-155. Further, the administrative law judge permissibly found that Dr. Selby's opinion was not well-reasoned "[b]ecause Dr. Selby incorrectly concluded that Dr. Baker's test was not qualifying for disability, and based his determination that the [m]iner was able to perform his lastest coal mine work on that test result."[18] Decision and Order at 32; *see Clark*, 12 BLR at 1-155. Thus, we reject claimant's assertion that the administrative law judge failed to properly consider the opinions of Drs. Baker and Broudy.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). Furthermore, we affirm the administrative law judge's finding that the evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b) overall, as supported by substantial evidence.

CONCLUSION

In light of our affirmance of the administrative law judge's finding that the evidence did not establish the presence of complicated pneumoconiosis at Section 718.304 and that the evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b),[19] an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112.

[18] Claimant does not challenge the administrative law judge's consideration of Dr. Selby's opinion.

[19] In view of our affirmance of the administrative law judge's finding that the evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b), we decline to address claimant's challenges to the administrative law judge's findings that the evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), as any error would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order Denying Benefits in the Miner's Claim; and Order Directing the Parties to Show Cause Why I Should Not Remand the Claimant's Survivor's Claim to the District Director is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

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JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination to affirm the administrative law judge's Decision and Order denying benefits in the miner's claim. Because the administrative law judge properly weighed the x-ray evidence which established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), but irrationally weighed the medical opinion evidence against the x-ray evidence, I believe her decision should be reversed.

The administrative law judge reasonably analyzed the x-ray evidence which established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). She found that there were three x-rays, each with two readings, one negative and one positive. The three negative readings were performed by dually qualified radiologists, Drs. Wiot, Poulos and Wheeler. The administrative law judge found that the opinions of Drs. Wiot and Poulos were likely in error because they diagnosed malignancies and there was no evidence the miner had a malignancy and none was shown in his biopsy. Decision and Order at 9-10. She discounted the opinion of Dr. Wheeler that the opacities seen were histoplasmosis, tuberculosis or sarcoidosis because there is no evidence that claimant had had any of these diseases and there was affirmative evidence he had not had histoplasmosis or tuberculosis. *Id.* at 9. Although the administrative law judge considered that the positive readings by B readers should not be given determinative weight, she found that because Dr. Wiot's negative reading was likely in error, it was outweighed by Dr. Baker's reading of a Category B opacity, and Dr. Poulos's negative

reading was similarly outweighed by Dr. Westerfield's reading of a Category C opacity. But the administrative law judge determined that the evidence was in equipoise on the x-ray read by Drs. Wheeler and Broudy because Dr. Wheeler's interpretation was merely discounted and Dr. Broudy's interpretation was entitled to less weight due to his inferior radiological credentials. Accordingly, the administrative law judge held that the weight of the evidence is positive for pneumoconiosis; she refrained from finding that it was positive for complicated pneumoconiosis, even though that is what the x-ray evidence established.

The administrative law judge irrationally weighed together the rest of the medical evidence. After crediting the biopsy evidence which was compatible with simple coal workers' pneumoconiosis or rheumatoid nodule, the administrative law judge credited the opinion of Dr. Caffrey, a Board-certified pathologist, that the miner had Caplan's Syndrome, rheumatoid arthritis with rheumatoid disease of the lungs with associated simple coal workers' pneumoconiosis. The administrative law judge also found that "Dr. Caffrey's explanation that the large abnormalities in the miner's lung are due to rheumatoid arthritis, and not to complicated pneumoconiosis, to be supported by objective evidence (biopsy results) and medical authority as cited in his report."[20] Decision and Order at 23-24. The administrative law judge concluded that Dr. Caffrey's opinion provided a credible, alternate explanation for the opacities in the miner's lungs. *Id*. at 24.

Weighing medical opinion evidence together, the administrative law judge determined to give "little weight" to Dr. Broudy's diagnosis of complicated pneumoconiosis because he did not address whether rheumatoid arthritis affected the miner's lung. *Id*. She then gave "little weight" to Dr. Baker's opinion because she believed he was influenced by Dr. Broudy's opinion. The administrative law judge gave "some weight" to Dr. Caffrey's opinion and concluded it outweighed the x-ray evidence of complicated pneumoconiosis. *Id*.

The administrative law judge irrationally discredited three x-ray interpretations of complicated pneumoconiosis, including one by an expert hired by employer, Dr. Broudy, based upon a pathologist's medical report suggesting that the opacities of Caplan's Syndrome can masquerade as progressive massive fibrosis and because the miner did have Caplan's Syndrome, he did not have progressive massive fibrosis. If, instead of

[20] Dr. Caffrey's report states: "In the textbook entitled Thurlbeck's Pathology of the Lung, 3rd edition, by Churg, et al, under the title *Rheumatoid Pneumoconiosis (Caplan's Syndrome)* the authors state, 'Characteristic radiological features are the presence of rapidly enlarging circumscribed nodules ranging in size from 0.3 to 5.0 cm in diameter. Unlike PMF, the condition usually arises within a background of mild simple CWP.'"

relying on Dr. Caffrey's report with selective quotations from authority, the administrative law judge had taken official notice pursuant to 29 C.F.R. §18.201(b)(2) of objective, authoritative presentations of the subject, she would have learned: that Caplan's Syndrome is associated with progressive massive fibrosis; that Caplan lesions usually manifest in a different part of the lung from complicated pneumoconiosis; and that Caplan's Syndrome is not one of the diseases which needs to be considered when interpreting large opacities as progressive massive fibrosis. An article on "Coal Worker's Pneumoconiosis" in Emedicine.Medscape.com reflects that Caplan's Syndrome is the combination of rheumatoid arthritis with progressive massive fibrosis:

> Progressive massive fibrosis in association with rheumatoid arthritis is known as Caplan syndrome. Caplan first described this condition in 1953. He noticed that miners with rheumatoid arthritis had changes on chest radiographs similar to those of progressive massive fibrosis, although the distribution in the lungs was different. Unlike lesions caused by progressive massive fibrosis, which congregate in the upper lobes, these new lesions (subsequently known as Caplan lesions) tend to coalesce in the peripheral lung fields.

Farham J. Khan, MD, Chief Editor, "Coal Worker's Pneumoconiosis," http://emedicine.medscape.com/article/297887-overview (updated March 27, 2014). Similarly, HealthHype.com reports, "Caplan's Syndrome is when the massive pulmonary fibrosis (complicated CWP) occurs along with rheumatoid arthritis." http://www.healthhype.com/what-is-coal-workers-pneumoconiosis-coal-dust-inhalation.html. It is a combination of progressive massive fibrosis and rheumatoid arthritis. *See* "Progressive Massive Fibrosis" in Lecture 3 of Pathology of the Respiratory System by Marie E. Kavanagh, M.D. (Fall 2001); http://iris.nyit.edu/~edoran/Course/Resp3lect01.htm.

Since Caplan lesions manifest in a different part of the lung from progressive massive fibrosis, it is unnecessary to consider Caplan's Syndrome when diagnosing progressive massive fibrosis by x-ray. According to the ILO, other diseases should be considered:

> Large opacities >> 1 cm) on the radiograph, coupled with a history of extensive coal mine dust exposure, are taken to imply the presence of PMF. However, it is important that other diseases such as lung cancer, tuberculosis and granulomas be considered. Large opacities are usually seen on a background of small opacities, but development of PMF from a category 0 profusion has been noted over a five year period.

"Coal Workers' Lung Diseases," Encyclopedia; http://www.ilo.org/iloenc/part-i/respiratory-system/item/419-coal-workers-lung-diseases?tmpl=component&print=1.

Review of these authorities reveals that the administrative law judge's determination to discredit the x-ray evidence of complicated pneumoconiosis by relying upon a medical report diagnosing Caplan's Syndrome was flatly wrong. There is a good reason Drs. Wiot, Poulos and Wheeler did not suggest Caplan's lesions as a valid alternative interpretation of the miner's progressive massive fibrosis: it is not. Since there is no credible evidence to undermine the force of the x-ray evidence of complicated pneumoconiosis in this miner with twenty-five years of coal mine employment, the administrative law judge's decision denying benefits should be reversed and the case remanded for payment of benefits pursuant to 20 C.F.R. §718.304.[21]

As the administrative law judge's decision is manifestly wrong, I respectfully dissent from the majority's decision to affirm it.

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REGINA C. McGRANERY
Administrative Appeals Judge

[21] In view of this conclusion, it is unnecessary to address the other errors the administrative law judge made in her decision denying benefits.